

International Commercial Transactions: 1996

By Peter Winship*

The year 1996 was a quiet one in the world of international commercial law. The principal accomplishment was the adoption of a Model Law on Electronic Commerce, but progress was also made on several international secured transactions projects. The following survey focuses on these and other projects that touch on subject matter within the scope of the Uniform Commercial Code.¹ As in the past,² the survey examines completed projects, pending projects, and proposed projects before the U.N. Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Organization of American States (OAS).³ Where significant, there are also references to the work of non-governmental bodies. The survey concludes with comments on implementation in 1996 of international texts approved in previous years.

COMPLETED PROJECT

UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE

Work within UNCITRAL on a Model Law on Electronic Commerce (Model Law)⁴ came to a successful conclusion in 1996. UNCITRAL approved the text of the Model Law at its annual session in May and June.⁵

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2. See Peter Winship, *International Commercial Transactions: 1995*, 51 BUS. LAW. 1493 (1996).

3. For information about these international bodies, see Peter Winship, *International Harmonization of Private Law*, in INTRODUCTION TO TRANSNATIONAL LEGAL TRANSACTIONS 159 (Marylin J. Raisch & Roberta I. Shaffer eds., 1995).

4. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE, 36 I.L.M. 200 (1997). For a brief overview, see Harold S. Burman, *Introductory Note*, 36 I.L.M. 197 (1997).

5. *Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, 28 May-14 June 1996*, U.N. GAOR, 51st Sess., Supp. No. 17, U.N. Doc. A/51/17 Annex I (1996). The 1996 annual session completed the work of the Commission's 1995 session. For a brief report of the 1995 session, see Winship, *supra* note 2, at 1499.

On December 16, 1996, the U.N. General Assembly adopted Resolution 51/162 recommending that all States give favorable consideration to the Model Law when they enact or revise their laws "in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information."⁶ To assist jurisdictions considering enactment, the UNCITRAL Secretariat is preparing a *Guide to Enactment*.⁷ The Model Law is already having some influence within the United States. It is, for example, one of the sources that the newly appointed NCCUSL Electronic Communications in Contractual Relations Committee will consult when drafting a uniform law for the United States.⁸

The Model Law applies to "data messages" (i.e., information generated, sent, received, or stored by electronic, optical, or similar means) used in the context of commercial activities.⁹ Thus, the Model Law will cover electronic data interchange (EDI), electronic mail, telegram, telex or telecopy, and any other electronic, optical, or similar media developed in the future. UNCITRAL has deliberately left room for future developments. When UNCITRAL began its work on this topic in 1992, the draft Model Law referred only to EDI. Since then, however, commercial use of the Internet and new forms of optical scanning have become significant.

The concern that the Model Law not inhibit future developments is also reflected in the structure of the final law. The second part of the Model Law is deliberately left open-ended. As adopted in 1996, this part includes only special rules for maritime commerce, but UNCITRAL retained the option of adding specific provisions for other special transaction types at a later time. These special rules supplement the general rules of the first part, which apply to data messages used in any commercial transaction.

The general rules of Chapter II of Part One address how existing legal requirements as to form and evidence are to be read when parties use data messages. Jurisdictions that enact the Model Law will not deny legal effect or validity to information solely because the information is in the form of a data message.¹⁰ Thus, laws requiring a writing, a signature, or an "original" record will now be read as media neutral.¹¹ Evidentiary rules

6. G.A. Res. 51/162, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/162 (1996), *reprinted in part* in Burman, *supra* note 4, at n.*.

7. *Guide to Enactment of UNCITRAL Model Law on Electronic Commerce* (10 February 1997 draft). For the Commission's deliberations on the *Guide*, see *Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, 28 May-14 June 1996*, *supra* note 5, at paras. 60-62, 205-08.

8. D. Benjamin Beard, *Preliminary Issues* (Apr. 10, 1997) (reporter's memorandum to drafting committee) available at <<http://www.law.upenn.edu/library>>.

9. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE, *supra* note 4, arts. 1, 2(a). It is not intended, however, to override any rule of law intended for the protection of consumers. *Id.* at n.**.

10. *Id.* art. 5.

11. *Id.* arts. 6-8. The rules apply whether the laws are in the form of an obligation or a statement of the consequences of failing to satisfy the requirement.

on admissibility and evidentiary weight are also required to be media neutral, as are laws that require the retention of information for a stated period of time.¹² The Model Law takes no position on whether parties may agree to vary the requirements of these other laws. Parties will therefore have to look to the terms of these other laws to determine whether they have this right.

Chapter III of Part One governs the communication of data messages. Unlike the rules of Chapter II, however, parties may agree to vary or to exclude these rules.¹³ They include rules on contract formation, the attribution of data messages, acknowledgment of receipt, and the time and place of dispatch and receipt of a data message.¹⁴ The principal function of these rules is to allocate risks among those who communicate through electronic media.

WORK-IN-PROGRESS

ELECTRONIC COMMERCE

The UNCITRAL Working Group that prepared the 1996 Model Law on Electronic Commerce continues to study more specific issues. At its 1996 session, UNCITRAL requested the Secretariat to prepare background studies with respect to digital signatures and certification authorities.¹⁵ The Secretariat subsequently published its study on these issues and also the issue of incorporation by reference.¹⁶ The study included draft uniform rules on the former issues.¹⁷ The Working Group reviewed this study and the draft rules at a February 1997 meeting.¹⁸

INTERNATIONAL ASPECTS OF SECURITY INTERESTS IN MOBILE EQUIPMENT

The Governing Council of UNIDROIT has appointed a study group to draft uniform rules governing international interests in mobile equipment.¹⁹ The study group reviewed a first draft at its meeting in mid-April

12. *Id.* arts. 7-10.

13. *Id.* art. 4(1).

14. *Id.* arts. 11, 13-15.

15. *Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, 28 May-14 June 1996*, *supra* note 5, at paras. 216-224.

16. *Planning of Future Work on Electronic Commerce: Digital Signatures, Certification Authorities and Related Legal Issues*, U.N. Doc. A/CN.9/WP.71 (1996).

17. *Id.* at paras. 52-76.

18. *Report of the Working Group on Electronic Commerce on the work of its thirty-first session*, U.N. Doc. A/CN.9/437 (1997).

19. For an introduction to the UNIDROIT project, see Martin J. Stanford, *Completion of a First Draft of Unidroit's Planned Future Convention on International Interests in Mobile Equipment*, 1 UNIF. L. REV. 274 (1996).

1996 and a revised draft at its next meeting in mid-January 1997.²⁰ In conjunction with the latter meeting, a special group of technical experts met to consider details of a proposed registry for the recording of the international interests. The study group also has appointed a special aviation working group to consider the special problems of that industry.

The latest draft covers security agreements, title-retention transactions, and leases of high-value mobile equipment. The international interests created would be distinct from any interests that might arise under national law. The Convention would govern the priority of these international interests vis-à-vis third parties, including the debtor's representative in insolvency proceedings. Notice to third parties by registration of the interest in an international register would be an essential component for determining priority. There are also provisions for the assignment of leases. At its last meeting, the study group also concluded that it may be desirable to proceed with a first draft of a proposed protocol addressing the specific problems of the aviation industry. One proposal before the committee is to bring the basic text into force with respect to specific industries by way of a protocol to the basic text.

RECEIVABLES FINANCING

An UNCITRAL Working Group took up work on draft uniform rules on receivables financing in 1995 and met twice in 1996.²¹ As presently drafted, these rules would apply to the assignment of international receivables and also to the international assignment of domestic receivables. The substantive rules cover the form and content of assignments, the rights and obligations of the parties, and the rights of subsequent assignees. Draft choice-of-law rules also are included. The text would be consistent with the 1988 UNIDROIT Convention on International Factoring, which is now in force and to which the United States may become a party.²² The Working Group is scheduled to submit its final report on this topic to UNCITRAL at its 1999 annual session.

Following the November 1996 session, the U.S. delegation identified a number of open issues on which it sought guidance. With regard to scope, the delegation identified the following issues:

20. *Revised Draft Articles of a Future UNIDROIT Convention on International Interests in Mobile Equipment*, Study Group/Drafting Group Fourth Session/W.P. 1 (Feb. 1997).

21. *Report of the Working Group on International Contract Practices on the work of its twenty-sixth session (Vienna, 11-22 November 1996)*, U.N. Doc. A/CN.9/434 (1996); *Report of the Working Group on International Contract Practices on the work of its twenty-fifth session (New York, 8-19 July 1996)*, U.N. Doc. A/CN.9/432 (1996).

22. UNIDROIT Convention on International Factoring, May 28, 1988, 27 I.L.M. 943 (1988). The Convention entered into force on May 1, 1995 among France, Italy, and Nigeria. Hungary has since become a party. Ten other States, including the United States, have signed the Convention.

- (i) As between an *assignor* and an *assignee*, should the uniform rules apply only if both parties are in a jurisdiction that has adopted the rules? Should the rules only apply if the account debtor is in a jurisdiction that has adopted the rules?
- (ii) As between an *assignee* and an *account debtor*, should the uniform rules apply only if both parties are in a jurisdiction that has adopted the rules? Is it necessary that the assignor also be in such a jurisdiction?
- (iii) Should assignments of non-contractual receivables (e.g., tort claims and tax claims held by a state or municipality) be covered? If included, should special rules apply to such receivables?
- (iv) Should assignments of certain types of receivables (e.g., deposit accounts and insurance claims) be excluded? If included, should special rules apply to such receivables to avoid disrupting existing markets?
- (v) Should certain assignment transactions (e.g., gifts, assignments by consumers) be excluded?
- (vi) To what extent should parties be able to contract out of the application of the uniform rules?

With regard to present and future receivables, the open issues are:

- (i) How should the rules distinguish among (i) an earned receivable under an existing contract, (ii) an unearned receivable under an existing contract, and (iii) a receivable that will arise under a contract not yet in existence?
- (ii) When should an assignment of a receivable falling into one of the latter two categories be effective?

With regard to modification of the underlying contract, the delegation identified the following issue:

- (i) Under what circumstances should the assignor and the account debtor be able to modify their contract in such a way as to bind an assignee?

Open issues with regard to perfection and priorities are:

- (i) How should priority among competing claimants to an assigned receivable be determined? The Working Group has considered the following alternatives: the first assignee; the first assignee to file a notice in a public file; and the first assignee to notify the account debtor. Which priority rule is preferable?
- (ii) How should notice be given? The U.S. delegation has proposed that priority rules be based on filing notices of assignments in a notice filing system. The proposal contemplates that such a system should ultimately be computer-based. Such a system might be based on linked national registries or an international registry.

- (iii) If an assignee has priority under the proposed UNCITRAL rules, should that priority "trump" earlier priority achieved under national domestic law?

Open issues with regard to insolvency are:

- (i) To what extent should the rules defer to applicable national insolvency laws?
- (ii) Should the rules establish uniform rules on certain insolvency law issues?

Finally, with regard to private international law, the delegation identified the issue of whether the uniform rules should include rules of private international law (i.e., conflict of laws, choice-of-law, or applicable law) and, if so, what rules would be most appropriate for modern commercial finance?²³ Comments on these issues may be sent to the delegates directly or by way of the Department of State.²⁴

CROSS-BORDER INSOLVENCY

An UNCITRAL Working Group met twice in 1996 and again in January 1997 to prepare draft provisions for dealing with cases of cross-border insolvency.²⁵ The result of this work are draft Model Legislative Provisions on Cross-Border Insolvency. These provisions address the recognition of foreign insolvency proceedings, access of foreign representatives and creditors to courts, judicial cooperation, and concurrent proceedings.²⁶ The full Commission will take up these draft provisions at its annual session in May 1997.²⁷ UNCITRAL also will have before it at this session a draft guide to enactment prepared by the Secretariat.²⁸

FUTURE WORK

PRIVATELY-FINANCED INFRASTRUCTURE PROJECTS

At its 1996 session, UNCITRAL decided to undertake the preparation of a legislative guide for legislation supporting Build-Operate-Transfer

23. U.S. Delegation, *UNCITRAL project to develop uniform rules on the assignment of receivables* (Dec. 30, 1996).

24. The U.S. delegates are Harold S. Burman, Neil Cohen, Ed Smith, and Peter Winship. For the U.S. Department of State address, see *supra* note 1.

25. *Report of the Working Group on Insolvency Law on the work of its twenty-first session (New York, 20-31 January 1997)*, U.N. Doc. A/CN.9/435 (1997); *Report of the Working Group on Insolvency Law on the work of its twentieth session (Vienna, 7-18 October 1996)*, U.N. Doc. A/CN.9/433 (1996); *Report of the Working Group on Insolvency Law on the work of its nineteenth session (New York, 1-12 April 1996)*, U.N. Doc. A/CN.9/422 (1996).

26. *Draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency*, Annex, U.N. Doc. A/CN.9/436 (1997).

27. *Provisional Agenda*, Item 4, U.N. Doc. A/CN.9/430 (1997).

28. *Note by the Secretariat: Draft Guide to Enactment of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency*, U.N. Doc. A/CN.9/436 (1997).

(BOT) projects.²⁹ This legislation would provide the legal framework for a government concession to a private consortium to build and operate public works projects for a limited time. UNCITRAL directed the Secretariat to prepare a first draft addressing relevant issues. This work is to be undertaken in cooperation with experts and other international organizations. Work on contractual aspects of BOT projects is to be left to these other organizations, although UNCITRAL directed the Secretariat to monitor the work of these organizations. The provisional agenda for the 1997 UNCITRAL session includes this topic, now renamed "privately-financed infrastructure projects."³⁰ UNCITRAL will have before it a proposed table of contents for the proposed legislative guide and the initial drafts of three chapters.

ORGANIZATION OF AMERICAN STATES: CIDIP-VI

The Organization of American States periodically convenes specialized conferences on private international law, known by the acronym CIDIP. CIDIP-V was held in March 1994 in Mexico City. At that time, the conference recommended possible topics for the agenda of the next conference. In June 1996, the OAS General Assembly adopted a resolution that approved in principle the convening of a sixth conference, but did not set the agenda for the conference. Among suggested topics now being considered by the member States is harmonization of personal property secured transactions law.³¹

OTHER DEVELOPMENTS

MARITIME BILLS OF LADING

At its May 1996 meeting, the Maritime Law Association of the United States (MLA) approved the text of a revision to the federal Carriage of Goods by Sea Act of 1936.³² The revision incorporates the text of certain provisions of the Pomerene Act and provides for electronic bills of lading. Both revisions are relevant if Article 7 of the Uniform Commercial Code is to be revised. Incorporation verbatim of the Pomerene Act³³ reflects not only a desire to bring those provisions to the attention of maritime law

29. *Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, 28 May-14 June 1996*, *supra* note 5, at paras. 225-230.

30. *Provisional Agenda*, Item 5, U.N. Doc. A/CN.9/430 (1997).

31. For a list of the topics now being considered, see Harold Burman, *Private International Law (PIL)*, 31 INT'L LAW. 685, 685 (1997).

32. *Formal Report of the Committee on Carriage of Goods*, MLA Doc. No. 724 (May 3, 1996) [hereinafter *MLA Report*]. For analysis by the reporter of the revision, see Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUSTON J. INT'L L. 609 (1996).

33. Maritime Law Association of the United States, *Proposed Bill: The Carriage of Goods by Sea Bill § 1303(4)(b)*, *reprinted in* *MLA Report*, *supra* note 32, at 46-49.

practitioners but also dissatisfaction with the recent recodification of the Pomerene Act.³⁴

Provision for electronic bills of lading, on the other hand, is forward looking and reflects a judgment that electronic communication will become increasingly important to participants in maritime trade. The MLA text amends the definition of "contract of carriage" to state that the term "includes, but is not limited to, negotiable or 'order' bills of lading and non-negotiable or 'straight' bills of lading, whether printed or electronic."³⁵ The term "electronic" is defined, in turn, as including "Electronic Data Interchange (EDI) or other computerized media."³⁶ This definition goes on to provide that "[i]f the parties agree to use an electronic bill of lading, it shall be a 'contract of carriage' governed by this Act and the procedures for such bills of lading shall be in accordance with rules agreed upon by the parties."³⁷ No attempt is made, however, to address issues raised when a paper bill of lading is transformed into an electronic bill. These issues include such matters as how to "negotiate" a negotiable electronic bill, how to pledge the bill, and how to present the bill in order to obtain delivery of the goods. Apparently, these matters are to be governed by the "procedures" adopted by the parties' contract. No doubt the drafters contemplate parties will adopt such rules as the CMI Rules.³⁸

STANDBY LETTERS OF CREDIT

In recent years, there have been significant developments with respect to standby letters of credit. As reported in last year's survey,³⁹ the U.N. General Assembly approved the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit drafted by UNCITRAL in December 1995.⁴⁰ The relation between this Convention and other texts, such as the International Chamber of Commerce's *Uniform Rules for*

34. On July 5, 1994, Congress recodified the Federal Bills of Lading Act of 1916 as part of a more general recodification of Title 49 of the United States Code. Pub. L. No. 103-272, 108 Stat. 745 (codified at 49 U.S.C. §§ 80101-80116 (1994)). The redrafted text was not intended to make substantive changes to the 1916 Act, and Congress adopted the new text without controversy.

35. Maritime Law Association of the United States, Proposed Bill: The Carriage of Goods by Sea Bill § 1301(b), *reprinted in* MLA Report, *supra* note 32, at 43.

36. *Id.* § 1301(g).

37. *Id.*

38. International Rules for Electronic Bills of Lading, *reprinted in* 6 Benedict on Admiralty Doc. 1-9 (Michael M. Cohen ed., 7th ed. 1991). See George F. Chandler, III, *The Electronic Transmission of Bills of Lading*, 20 J. MAR. L. & COM. 571 (1989).

39. Winship, *supra* note 2, at 1493-95.

40. For the text of the Convention, see *Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session*, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/48 (1996).

*Demand Guarantees*⁴¹ and the *Uniform Customs and Practice for the Collection of Commercial Credits*,⁴² is problematic. Use of standby credits began in the United States, but their use elsewhere in the world has increased significantly in recent years. Standby credits have proved to be more flexible than first-demand guarantees, which are used principally in Europe and which are suitable for a limited number of transaction types. This causes difficulty not only at the time of negotiating standby credits, but also at the time of resolving disputes.

With these considerations in mind, an informal Working Drafting Group has now prepared International Standby Practices (Draft ISP).⁴³ In format, the Draft ISP follows closely similar publications of uniform rules by the International Chamber of Commerce. Parties may make the rules applicable by a term incorporating the rules by reference.⁴⁴ As a purported restatement of generally-accepted international usage, the rules also may be enforceable as usage of trade. Anticipating the objection that the Draft ISP has been prepared primarily by representatives of issuers rather than users, the introduction to the Draft ISP stresses the participation of user representatives and the availability of earlier drafts to all interest groups.⁴⁵

IMPLEMENTATION

The principal development in 1996 was that the number of court decisions and arbitral awards construing the U.N. Convention on Contracts for the International Sale of Goods has reached a critical mass.⁴⁶ A 1996 publication by a German scholar identifies 284 decisions.⁴⁷ Only a handful of these cases have been decided by U.S. courts, but English-language abstracts and translations of many of these decisions are now easily accessible in the United States. While the case law identifies gaps and problem areas in the application of the Convention, the opinions do provide

41. International Chamber of Commerce, *Uniform Rules for Demand Guarantees* (1992) (Pub. No. 458).

42. International Chamber of Commerce, *Uniform Customs and Practice for the Collection of Commercial Credits* (1993) (Pub. No. 500).

43. *Draft International Standby Practices 1997* (Feb. 1997) [hereinafter Draft ISP]. The cover of the pamphlet containing the Draft ISP identifies the following institutions: Institute of International Banking Law & Practice, Inc.; Citibank, N.A.; The Chase Manhattan Bank N.A.; Baker & McKenzie; United States Council on International Banking; and National Law Center for Inter-American Free Trade. The text of the draft may be obtained from Institute of International Banking Law & Practice, Inc.

44. *Id.* Rule 1.02. This rule suggests incorporation by using the following language: "This undertaking is issued subject to the International Standby Practices 1997 Edition ('ISP 1997')."

45. *Id.* at 8.

46. United Nations Convention on Contracts for the International Sale of Goods, April 10, 1980, U.N. Doc. A/CONF.97/18, Annex I (1980), *reprinted in* 19 I.L.M. 668 (1980) and 52 Fed. Reg. 6264 (1987).

47. M.R. Will, *International Sales Law under CISG: First 284 or so Decisions* (1996).

some level of comfort that national courts and arbitral tribunals are able to resolve disputes by applying the Convention. U.S. lawyers who have advised clients to exclude application of the Sales Convention because of uncertainty in application of a new text may now wish to reconsider this advice.⁴⁸

Texts of these opinions in the original language are available through the CLOUT service provided by the UNCITRAL Secretariat in Vienna. The CLOUT service receives the opinions of relevant national court cases or arbitral awards from a network of "national correspondents," who also prepare an abstract of the opinion.⁴⁹ UNCITRAL then publishes the abstracts in both paper and electronic form.⁵⁰ UNCITRAL has published twelve collections of these abstracts and United Nations Publications has published several compilations of these collections.⁵¹

48. For general guidance, see Peter Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 INT'L LAW. 525-554 (1995), reprinted in 9 INT'L Q. 110-148 (1997).

49. The National Correspondents for the United States are Professors John O. Honnold (University of Pennsylvania Law School) and Peter Winship (S.M.U. School of Law).

50. The abstracts are found at the UNCITRAL website: <<http://www.un.or.at/uncitral/>>.

51. Several unofficial sources also make available these opinions. Transnational Publishers, Inc., publishes abstracts and opinions edited in English by UNILEX, an Italian center under the direction of Professor Joachim Bonell. The UNILEX materials are now available in paper and as a computer file on a floppy disk. The *Journal of Law & Commerce*, published by the University of Pittsburgh Law School, publishes an annual issue with translations of important foreign opinions, together with casenotes and commentary. In March 1996, the Institute of International Commercial Law at Pace University School of Law inaugurated an electronic database of Sales Convention materials, including court opinions and casenotes, which readers will be available to read by way of the internet and World Wide Web. The Pace website is found at <<http://cisgw3.law.pace.edu/>>. There are also databases maintained at the Universities of Freiburg and Strasbourg. The Freiburg website is found at <<http://www.jura.unifreiburg.de/ipr1/cisg/>>. The Strasbourg website is found at <<http://www.jura.unisb.de/FB/LS/Witz/cisg.htm>>. The Westlaw and LEXIS databases, of course, include the relatively few U.S. court opinions construing the Convention. The first monographic survey of this case law has been published in France. Claude Witz, *Les premières applications jurisprudentielles du droit uniforme de la vente internationale* (Paris: Librairie Générale de Droit et de Jurisprudence, 1995).